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No. 580.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

THE UNITED STATES, APPELLANTS,

v.

CONRAD HEINSZEN AND GUSTAV BROCKMAN, TRADING AS PARTNERS UNDER THE FIRM NAME OF C. HEINSZEN & CO.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

CHARLES J. BONAPARTE,
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STATEMENT OF THE CASE.

This suit was brought in the Court of Claims on July 1, 1902, by the appellees, subjects of the Emperor of Germany, to recover certain import duties, aggregating the sum of $16,827.31, collected under the Presidential order of July 12, 1898, and subsequent amendments, by the officer of the United States Army then acting as collector of customs at the port of Manila. The duties were paid on goods manufactured in the United States and imported into the Philippine Islands between April 11, 1899, and November 15, 1901.

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This is an important class case, the decision of which involves the validity of the collection of duties amounting to several millions of dollars.

The duties in question were collected by the collector of customs and paid over to the treasurer of the Philippine Islands in the ordinary and usual course of business, without either objection or protest on the part of importer or consignee. The duties so collected were used for the maintenance and support of the government of the Philippine Islands.

On August 23, 1906, the defendants filed a demurrer to the claimants' petition, which was overruled by the Court of Claims in an opinion dated January 7, 1907, with leave to the defendants to further plead within sixty days.

On January 22, 1907, the defendants filed a general traverse to the claimants' petition, and on the same day the case was submitted to the Court of Claims upon an agreed statement of facts prepared by the attorneys for the claimants and the defendants.

On January 23, 1907, the Court of Claims rendered a judgment in favor of the claimants in the sum of $16,827.31—

ASSIGNMENT OF ERRORS.

The Court of Claims erred—

First. In not holding that the duties in question were voluntarily paid to the collector of customs.

Second. In not holding that the validating act of June 30, 1906 (34 Stats., 636), operated to legalize, ratify, and confirm the collection of said duties.

Third. In not dismissing the claimants' petition.

AMERICAN CONTROL OF THE PHILIPPINE ISLANDS.

I.

Tariff Orders of the President Prior to the Ratification of the Treaty of Paris.

Following the destruction of the Spanish fleet by Admiral Dewey in Manila Bay and the occupation of the naval station at Cavite, the President, on May 19, 1898, addressed a communication to the Secretary of War, in which he stated that the time had arrived for the military occupation of the Philippine Islands. In this letter he stated that he had appointed Maj. Gen. Wesley Merritt to the command of the military forces in the islands, and directed him upon arrival at Manila to publish a proclamation outlining the policy for the control of the conquered territory.

On the same day the President addressed a communication to the Secretary of the Treasury, stating that he intended to open all ports and places in the Philippines in the actual possession "of our land and naval forces by conquest" to the commerce of all neutral nations "as well as our own." He was directed to examine the existing Spanish laws in relation to duties and taxes, and make such recommendations as he deemed proper with respect either to the rates of duties and taxes or to the regulations which should be adopted for their imposition and collection. The President stated that during the military occupation of the islands the collections would be made "under the orders of the Secretary of War and the Secretary of the Navy, by the military or naval commanders, as the case may be, of the

ports or places which may be in the possession of our forces. Your report is desired in order that I may be able to give the proper directions to the Department of War and of the Navy." (Messages and Papers of the Presidents, vol. 10, pp. 208–212.)

On July 13, 1898, the Executive order of July 12, 1898 (R., 22), was published at Washington, D. C., by the Secretary of War, and attached to the order, under the same cover, was a pamphlet entitled "Customs Tariff and Regulations for the Philippine Islands." This order did not reach Manila until some time in September, 1898.

When the pamphlet containing the Presidential order of July 12, 1898, and the "Customs Tariff and Regulations" reached Manila, the schedule of tariff duties was found to be unsuited to the business conditions existing at that place, and upon the receipt of petitions and requests from merchants and business men of Manila asking for modifications, a board of officers was appointed by the military governor on September 24, 1898, to consider modifications of the duties on certain classes of goods.

On September 29, 1898, the military governor postponed the operation of the tariff until November 10th, and this suspension was afterwards confirmed by an executive order issued by the Secretary of War on October 13th.

On October 3, 1898, an expert on revenue matters was ordered by the War Department to report to the

collector of customs at Manila for special service. "He was directed to make a careful study of the trade conditions of this port and of the United States customs tariff and regulations, with a view of recommending such modifications as would put them in the best practicable shape for promulgation." The expert, under the direction and with the assistance of the collector of customs, prepared and submitted his report on October 24, 1898, which was practically a literal copy of the Spanish regulations that went into force under the royal decree of January 7, 1891. His report having been approved, it was printed in pamphlet form and issued as "Customs Tariff and Regulations in the Philippine Islands," to take effect November 10, 1898.

The tariff schedule of the Customs Tariff and Regulations, as put in force on November 10, 1898, imposed a lower rate of duties than the tariff act of July 24, 1897 (30 Stats., 151), commonly known as the "Dingley Act." (Ann. Rep. Maj. Gen. Commanding the Army, 1899, part 2, pp. 313 and 314, and Rec., p. 29.)

The provisions of the customs tariff and regulations were amended by orders of the President of April 10, 1899 (Rec., 31), and May 3, 1899 (Rec., 74). These orders contained directions to the military officers, acting as collectors of customs, as to the manner in which the business at the ports should be conducted.

II.

Government of Philippine Islands following the ratification of the treaty of Paris.

Following the ratification of the treaty of peace between Spain and the United States, on April 11, 1899, the military government remained in force in the Philippine Islands until the letter of instructions of President McKinley, dated April 7, 1900, to the Secretary of War. In this letter the President outlined his policy for the establishment of a civil government in the Philippines. In accordance with the intention expressed therein he appointed five commissioners, designating Honorable William H. Taft as president of the board, "to continue and perfect the work of organizing and establishing civil government already commenced by the military authorities, subject in all respects to any laws which Congress may hereafter enact." The acts of the Commission were to be subject to the approval and control of the Secretary of War, to whom its reports should be made. The Commission was given general authority to legislate and establish a complete system of civil government for the islands. The instructions directed that whenever, in the opinion of the Commission, the condition of affairs in the islands justified, report should be made to the Secretary of War, and the central administration would be transferred from military to civil control. The instructions provided for the transfer of the legislative power from the military government to the Commission, to take effect September 1, 1900, under such rules and regulations as

the Secretary of War should prescribe. Under this legislative power, the Commission was given authority to make "rules and orders, having the effect of law, for the raising of revenue by taxes, customs, duties, and imports; the appropriation and expenditure of public funds of the islands; the establishment of an educational system throughout the islands; the establishment of a system to secure an efficient civil service; the organization and establishment of courts; the organization and establishment of municipal and departmental governments, and all other matters of a civil nature for which the military government is now competent to provide by rules or orders of a legislative character."

Under the power and authority granted by the letter of instructions of the President of April 7, 1900, the Commission passed a large number of acts relating to the internal affairs of the Philippine Islands, embracing a great variety of subjects and dealing extensively with the finances of the insular government. Those acts have been collected in six large volumes under the title of "Public Laws Enacted by the Philippine Commission."

The transition from a military to a civil government, under the Philippine Commission, was authorized by Congress in the Spooner amendment to the army appropriation bill, approved March 2, 1901 (2 Supp., 1509), which provided, among other things, that—

> All military, civil, and judicial powers necessary to govern the Philippine Islands, acquired

> from Spain by the treaties concluded at Paris on the 10th day of December, 1898, and at Washington on the 7th day of November, 1900, shall, until otherwise provided by Congress, be vested in such person and persons, and shall be exercised in such manner as the President of the United States shall direct, for the establishment of civil government and for maintaining and protecting the inhabitants of said islands in the free enjoyment of their liberty, property, and religion.

The President, in pursuance of the authority contained in the Spooner amendment, issued an order June 21, 1901, to take effect July 4, 1901, appointing Hon. William H. Taft civil governor, transferring the civil authority from the military governor to the civil governor, and authorizing the Philippine Commission to exercise executive control under and in conformity to the letter of instructions of April 7, 1900.

On September 17, 1901, a tariff act was passed by the Philippine Commission (Pub. Laws Phil. Com., p. 581) and put in force by its terms November 15, 1901. It was entitled "An act to revise and amend the tariff laws of the Philippine Archipelago," the first section of which reads as follows:

> SEC. 1. The provisions of General Order No. 49, office of the United States military governor in the Philippine Islands, dated October 23, 1899, relating to the customs duties on imports and exports of the Philippine Islands, and tonnage duties and wharf charges therein, and the several orders supplementary thereto

and amendatory thereof, are herewith amended to read as follows:

General Order, No. 49, referred to therein, was an order of the military governor promulgating the tariff duties imposed by the Presidential order of July 12, 1898, as amended and revised down to September 1, 1899.

On March 8, 1902, the Congress passed an act (32 Stats., 54), entitled "An act temporarily to provide revenue for the Philippine Islands, and for other purposes," section 1 of which provides—

> that the provisions of an act entitled "An act to revise and amend the tariff laws of the Philippine Archipelago," enacted by the United States Philippine Commission on the 17th day of September, 1901, shall be and remain in full force and effect, and there shall be levied and collected and paid upon all articles coming into the Philippine Archipelago from the United States the rates of duty which are required by the said act to be levied, collected, and paid upon like articles imported from foreign countries into said archipelago.

On July 1, 1902, Congress passed an act (32 Stats., p. 691, sec. 1) entitled "An act temporarily to provide for the administration of the affairs of the civil government in the Philippine Islands, and for other purposes," in which, by section 1, it approved, ratified, and confirmed the acts of the President and the Philippine Commission under the President's instructions of April 7, 1900, the Executive order of June 21, 1901, and the act creating the several departments of

the Philippine government enacted by the Philippine Commission September 6, 1901. By section 2 of the act of July 1 (supra) the acts of the President in promulgating the order of July 12, 1898, and the amendments thereto, and the acts of the authorities of the Philippine Islands taken in accordance with the provisions of said order and subsequent amendments, were approved, ratified, and confirmed.

THE DUTIES IN QUESTION WERE PAID VOLUNTARILY TO THE COLLECTOR OF CUSTOMS.

I.

No Protest.

Assuming that the ratification act of 1906 is unconstitutional, which we do not admit, there still can be no recovery in this case. The duties in question were voluntarily paid to the collector of customs, and, under a long and unbroken line of State and Federal decisions, there can be no recovery. It is a time-honored maxim, handed down from remote generations, that "Ignorance of the law excuses no man." And upon this maxim is founded one of the fundamental principles of the common law, that "Money paid in mistake of law can not be recovered." As was tersely said by Lord Ellenborough in *Bilbie* v. *Lumley*, 2 East., 472, "Every man must be taken to be cognizant of the law; otherwise there is no saying to what extent the excuse of ignorance might be carried." (For an elaborate re-

view of the English authorities see *Clark* v. *Dutcher*, 9 Cowen, N. Y., 674.)

The rule is clearly stated by Judge Cooley as follows:

> Every man is supposed to know the law, and if he voluntarily makes a payment which the law would not compel him to make, he can not afterwards assign his ignorance of the law as a reason why the State should furnish him with legal remedies to recover it back. Especially is this the case when the officer receiving the money, who is chargeable with no more knowledge of the law than the party making payment, is not put on his guard by any warning or protest and the money is paid over to the use of the public in apparent acquiescence in the justice of the exaction. (Cooley on Taxation, vol. 2, p. 1498.)

The law as to what constitutes an involuntary payment, and the elements necessary to establish such a payment, is clearly stated in the case of *De la Cuesta* v. *Insurance Company*, 136 Pa. State, 78, 79, wherein the court, speaking through Mr. Justice Paxson, said:

> There is no principle of law better settled than that money voluntarily paid with a knowledge of the facts can not be recovered back. It is unnecessary, in referring to a settled rule of law, always to state the reasons of the rule in a judicial opinion. It is sufficient to say here that I know of no legal principle which is sustained by better reasons of public policy. If in every instance in which a man is in doubt as to which is the safe course to

pursue he can pay under protest and then sue to recover it back, it is difficult to see where litigation is to end. The law therefore wisely holds that a voluntary payment can not be recovered back. In the recent case of *Harvey* v. *Girard N. Bank*, 119 Pa., 212, the law is thus stated: "A voluntary payment of money under a claim of right can not in general be recovered back. There must be compulsion, actual, present, and potential, in inducing the payment by force of process available for instant seizure of person or property, when the party so paying must give notice of the illegality of the demand and of his involuntary payment. The element of coercion being essential, a mere protest or notice will not change the character of the payment or confer of itself a right of recovery;" citing *Peebles* v. *Pittsburgh*, 101 Pa., 304. In *Harvey* v. *The Bank* there was a loss of credit, a very serious matter to a business man, by permitting a draft to go to protest. The party paid to protect his commercial honor, but we said it was not duress. In *Neely's App.*, 124 Pa., 406, there was an attempt to set aside an antenuptial contract on the ground of duress. After the marriage day had been fixed, the guests invited, and the caterer engaged, the husband produced an antenuptial contract which he required his intended wife to sign. She protested by her tears; his reply was, "No contract, no wedding." We held there was no duress. Many other cases of a like nature could be cited were it necessary.

Those above mentioned are referred to as showing that mere embarrassment or loss of credit, as in the bank case, or mortification, as in the *Neely* case, do not amount to the kind of duress which the law recognizes as justifying a payment under protest. And just here it is proper to remark that the only effect of a protest, in a case in which it may be legitimately applied, is to show that the payment was not voluntarily made, and that the party protesting intends to claim it back.

The rule thus announced, that in the ordinary course of business money paid in mistake of law can not be recovered back, applies with especial force where the payment has been for taxes. Payments made for that purpose, although the taxes were illegally collected under a void statute and paid under compulsion, are still voluntary, unless the rights of the parties paying have been preserved by protest. This rule of law proceeds upon the theory that it is against public policy to allow taxes which have been paid into the treasury of a State, without notice of an intention to sue for their recovery, to be refunded. Such notice should be given to the collector as would put him upon his guard and prevent him from settling his accounts with the State without taking into consideration the possibility of a suit for the recovery of taxes illegally paid. The reasons for the requirement of protest have been clearly stated in the opinion of this court in the case of *Nichols and*

Company v. *The United States* (7 Wall., 128), where the court said:

> The prompt collection of the revenue and its faithful application is one of the most vital duties of government. Depending as the Government does on its revenue to meet not only its current expenses, but to pay the interest on its debt, it is of the utmost importance that it should be collected with dispatch, and that the officers of the Treasury should be able to make a reliable estimate of means in order to meet liabilities. It would be difficult to do this if the receipts from duties and internal taxes paid into the Treasury were liable to be taken out of it on suits prosecuted in the Court of Claims for alleged errors and mistakes, concerning which the officers charged with the collection and disbursement of the revenue had received no information. Such a policy would be disastrous to the finances of the country, for, as there is no statute of limitations to bar these suits, it would be impossible to tell in advance how much money would be required to pay the judgments obtained on them, and the result would be that the Treasury estimates for any current year would be unreliable.

This court has uniformly held that some kind of notification to the collector at the time of payment is necessary in order to entitle the taxpayer to recover taxes illegally paid. In the leading case of *Elliott* v. *Swartwout* (10 Pet., 137) this court laid down the common-law rule of protest with great clearness, and that rule has been followed ever since, not only by the Federal but by the State courts.

(*Bend* v. *Hoyt*, 13 Pet., 262; *Swartwout* v. *Gihon*, 3 How., 110; *Lawrence* v. *Caswell*, 13 How., 488; *Nichols & Company* v. *United States*, 7 Wall., 128 (decided after the passage of the customs act of February 26, 1845, requiring written protest); *Erskine* v. *Van Arsdale*, 15 Wall., 77; *De Lima* v. *Bidwell*, 182 U. S., 1; *United States* v. *New York and Cuba Mail S. S. Co.*, 200 U. S., 488; *Chesebrough* v. *United States*, 192 U. S., 260; *Newhall* v. *Jordan*, 149 Fed. Rep., 586; *Smith* v. *Schroeder*, 15 Minn., 35; *Galveston Company* v. *Gorham*, 49 Tex., 279; *Cauvin & Duprez* v. *Mayor et al.*, 3 Baxter, 453; *Jenks* v. *Lima Township*, 17 Ind., 328; *Mays* v. *Cincinnati*, 1 Ohio, 276.)

II.

Protest a Condition Precedent to the Right of Recovery.

There is no allegation or finding of fact in this case to show involuntary payment. It is incumbent upon the appellees to establish this fact as a condition precedent to the right of recovery. In the case of *McMillan* v. *Richards* (9 Cal., 365–421), where money was erroneously paid to redeem lands sold at sheriff sale, the court said:

> The object of a protest is to take from the payment its voluntary character, and thus conserve to the party a right of action to recover back the money. It is available only in cases of payment under duress or coercion, or when undue advantage is taken of the party's situation.

This case was cited with approval in *Bucknall* v. *Storey* (46 Cal., 595), and that case in turn was

affirmed in the case of *De Baker* v. *Carillo* (52 Cal., 473).

The case of *Hamilton* v. *Dillon* (21 Wall., 73), in its essential features, bears a striking resemblance to the case at bar. In that case, during the civil war, the President, under authority of a provision of the act of July 13, 1861, which empowered him to license and permit commercial intercourse between the citizens of loyal States and the inhabitants of insurrectionary States, issued an Executive order, dated March 31, 1863, licensing and permitting such commercial intercourse between the citizens of loyal States and the inhabitants of insurrectionary States. In carrying out the license the permit required each licensee to pay a fee or tax of four cents per pound on cotton, although the act did not provide for the imposition of this tax or fee. The court in its opinion (p. 91) said:

> The position in which the plaintiffs put themselves, therefore, was an entirely voluntary one. They have no right now to say: "It is true we purchased the cotton under a license which required us to pay a certain bonus; but having purchased it, we were entitled to repudiate the condition, although we had no right to make the purchase except by virtue of the license." Much less have they now a right to say, after having complied with the conditions without murmur or objection, that the bonus was extorted from them by compulsion.

If any doubt should exist that this court always has considered, and still considers, a notification that would amount to a protest, necessary in all cases in which suit is brought for the recovery of illegal duties, that misapprehension should be removed by the language used by the court in the case of *Chesebrough* v. *United States* (192 U. S. at p. 260):

> There are, no doubt, cases to be found in which the language of the court, if separated from the facts of the particular case under consideration, would seem to imply that a protest alone was sufficient to show that the payment was not voluntary; but on examination it will be found that the protest was used to give effect to the other attending circumstances. Thus, in *Ellioit* v. *Swartwout*, 10 Pet., 137, and *Bend* v. *Hoyt*, 13 Pet., 266, which are customs cases, the payments were made to release goods held for duties on imports, and the protest became necessary in order to show that the legality of the demand was not admitted when the payment was made. The recovery rested upon the fact that the payment was made to release property from detention, and the protest saved the rights which grew out of that fact. In *Philadelphia* v. *Collector*, 5 Wall., 730, and *Collector* v. *Hubbard*, 12 Wall., 13, which were internal-revenue tax cases, the actions were sustained "upon the grounds that the several provisions in the internal-revenue acts referred to warranted the conclusion as a necessary implica-

tion that Congress intended to give the taxpayer such remedy." It is so expressly stated in the last case, page 14. As the case of *Erskine* v. *Van Arsdale*, 15 Wall., 75, followed these and was of the same general character, it is to be presumed that it was put upon the same ground. In such cases the protest plays the same part as it does in customs cases, and gives notice that the payment is not to be considered as admitting the right to make the demand.

III.

Statutory Duress.

It is contended, however, by the appellees in this case that they were compelled to pay the duties under what may be termed statutory duress. It is insisted that the tariff rules and regulations placed such a restraint upon the appellees in the importation of their goods into the Philippines as to render the payment of the duties thereon involuntary. (R. 33, secs. 1 and 3.) For the purpose of establishing duress, the appellees are anxious and willing to take advantage of those provisions of the Customs Tariff and Regulations which provided for placing a military guard upon the vessel, but insist that the provisions of paragraph 10 (R. 37) of the regulations requiring the filing of protest before payment, as a condition precedent to the right of recovery, shall be ignored. In other words, *they wish to affirm the regulations for one purpose and repudiate them for another.* We think it may be stated as a correct proposition of

law that any general provision of law that applies to all property alike, to protect the Government in the collection of its revenues, and to prevent property from being removed out of the jurisdiction of the officers of the Government, until the taxes are paid, no matter how stringent it may be, or what restrictions it may place about the taxpayer and his property, can not alone constitute duress.

In the case at bar the duties were collected at the port of Manila under the Executive order of July 12, 1898, and subsequent amendments. Unless the collection of these duties has been legalized and ratified by the ratification act of 1906, they must be deemed to have been collected illegally. Assuming this to be the fact, it is still contended that there is no right of recovery.

The articles upon which the duties were collected were never in the possession of the United States. While it is true that a military guard went on board every vessel upon its arrival, the sole and only purpose of this procedure was to prevent the cargo, or any part of it, from being smuggled ashore to escape payment of the prescribed duties. The duties were paid in the usual and ordinary course of business, without coercion or threats, and without protest or objection of any kind from importer or consignee, and the course pursued in their collection was identical with that followed in the collection of similar duties, under the customs administrative act, at ports in the United States.

While perfectly cognizant of all the facts, neither the collector of customs nor the importer seemed to have been aware of any defects in the authority under which the duties were collected. They were collected by the customs officers and paid by the importers in the regular and usual course of business. There was no urgent necessity for immediate payment. Under the Customs Tariff and Regulations, the officer in command of the United States forces could not have seized the goods until the expiration of ninety days after their arrival in port. (R. 37, sec. 14.) During that period the goods were neither actually nor constructively in the possession of the United States. The only duty to be performed by the collector of curtoms and his subordinate officers was to prevent the discharge of the cargo until the duties were paid. The appellees were entitled, under the regulations, to ninety days within which to pay the duties, and upon presentation of good and sufficient reasons, to the officer in command of the United States forces, to an extension of three months. (R. 35, Tariff Circular No 9.)

From the surrender of Manila down to the present time, all statutes and orders, under which import duties have been collected at Philippine ports, have provided that in cases of objection to their payment, as illegal, no duties would be refunded unless paid under protest. Even prior to the American occupation, the laws under which the Spanish tariff was collected provided for protest in cases of objection to the payment

of the duties, and until November 10, 1898, when the Executive order of July 12, 1898, went into effect, duties were collected at the Philippine ports under the Spanish law, and subject to all protests therein provided. Articles 54, 199, 200, 202, 210, and App. 4, Par. 4, Royal Decree of July 7, 1891, and Customs Rules and Regulations effective April 1, 1891.

The Customs Tariff and Regulations annexed to the Executive order of July 12, 1898, continued the provisions of the Spanish tariff and provided (R. 37, sec. 10)—

> "that any objections to the assessment of duty must be filed by the importer before payment by him of the same, and no refund of duty will be made thereafter."

The tariff act of the Philippine Commission, passed September 17, 1901, to become effective November 15, 1901, embodied the Presidential order of July 12, 1898, and its annexed customs tariff and regulations, thereby providing for protest.

The administrative customs act, passed by the Philippine Commission February 6, 1902, followed very closely our customs administrative act, and provided for protest, in writing, setting forth definitely and specifically the reasons of objection.

The case of *Newhall* v. *Jordan, Collector* (149 Fed. Rep., 586), was for the recovery of duties paid in New York upon bay rum imported from Porto Rico, upon which no tax was authorized by statute. The parties stipulated "that the plaintiff could not obtain the

bay rum so imported by him except by paying duties." Judge Thomas, in the opinion, said:

> It is true that his property was detained, but the detention was on the theory that it was subject to the payment of the tax. Had there been no detention, and there had been payment, with or without protest, or acts or words equivalent thereto, the payment would have been voluntary. (*Chesebrough* v. *United States, supra*, 259.) But when property arriving in the country passes through the various channels that are necessary to the determination of the question of its taxation, and the importer himself pursues the law and does, without dissent or suggestion of oppression or duress, whatever is necessary to procure his goods, he makes his own interpretation of the law. And if he interpret it mistakenly there seems to be no rule that allows him at one time to affirm its application by his action—an affirmance unmodified by word or deed—and thereafter disaffirm the subjection of his merchandise to the statute, it is a payment under mistake of law, for which no relief exists.

The rule thus announced by the circuit court is a mere affirmance of what has been frequently held by this court. In the case of *Hamilton* v. *Dillin*, *supra*, it is said:

> Whether, therefore, the President and Secretary of the Treasury did or did not rightly judge as to their powers under the act, the plaintiffs evidently agreed with them, and voluntarily applied for permission to engage in the trade on the conditions imposed and

voluntarily paid the bonus which is now sought to be recovered back. The case does not come within any class of cases on which the plaintiffs rely to take it out of the rule as to voluntary payments. In our judgment, therefore, the defense in this case might have rested on this ground alone.

IV.

Legal Status of Collectors at Philippine Ports.

The Philippine Islands, immediately upon the ratification of the treaty of Paris, became domestic territory of the United States. It may be conceded that neither the military nor civil government established by the President could, after the ratification of the treaty, in the absence of express authority from Congress, legally impose duties on goods shipped into the Philippine Islands from the United States. The power to lay tariff duties rests primarily in Congress and can be exercised by the Executive or a Territorial government only upon the express authority of Congress. (*Dorr* v. *The United States*, 195 U. S., 138.)

This court, in its second opinion in the case of *Warner, Barnes & Co.* v. *United States* (202 U. S., 484), at page 499, held that the President had authority, after the final ratification of the treaty of peace with Spain, on April 11, 1899, to collect customs duties on imports from foreign countries into the Philippines under existing laws. The "existing laws" were evidently the customs administrative act of 1890 and the tariff act of July 24, 1897, commonly known as the "Dingley Act."

It is therefore clear that the collectors of customs at the ports in the Philippine Islands occupied exactly the same legal status with regard to unauthorized collections as the collectors of customs at the different ports in the United States. Hence, everything that has been decided concerning illegal collections at ports in the United States on imports from Porto Rico or the Philippine Islands, is equally applicable to collections made at ports in the Philippine Islands upon imports from the United States.

In the case of *De Lima* v. *Bidwell, supra,* this court held that the customs administrative act of 1890, in so far as it provided for an appeal from the decision of the collector, only applied to cases arising out of the collection of duties upon goods imported from a foreign country. It was held that the customs administrative act did not apply to goods imported into the United States from Porto Rico after the ratification of the treaty of Paris. The court, in the *De Lima* case, however, held that although a protest in writing, as required by the customs administrative act, was unnecessary, as a condition precedent to the right of recovery of duties illegally collected upon merchandise shipped into the United States from Porto Rico *still protest was necessary,* and clearly indicated that that protest must consist of three elements: First, an objection against the classification of the articles as "foreign;" second, a protest against the payment of the duties over by the collector; third, a notification to the collector of an intention to sue for the recovery of the duties.

The conditions existing at the port of New York, as set out in the *De Lima* case, were identical with the conditions existing at the port of Manila, so far as concerns the collection of duties upon the goods in question. In both cases the goods were imported from domestic territory into domestic territory; at both ports the Dingley law was applicable and could have been legally enforced. The collectors at the port of Manila were legally qualified officers for the collection of duties upon foreign goods, and so were the collectors at the port of New York. The mere fact that the rates paid on foreign goods, at Manila, under the Executive order, were less than could have been imposed under the Dingley law, is immaterial. Hence, the conditions being the same at both ports, it is difficult to understand why involuntary payment should be essential to the right of recovery in New York and not essential at Manila.

In the case of *Dewell et al.* v. *Mix* (116 Fed. Rep., 664) the learned judge rendered an opinion in which he presents a very lucid and masterly analysis of that part of the opinion of this court in the *De Lima* case relating to the effect of protest upon the payment of import duties. He said:

> The *De Lima* case (182 U. S., 1) disposes of nearly every question involved. In fact, it would have settled the entire controversy in the plaintiffs' favor absolutely if a written protest had been filed, and quite possibly if an actual verbal protest had been made, setting forth in either case that the goods in question were not imported merchandise, forbidding

the paying over of the moneys, and giving notice of an intention to recover by suit if necessary. It can make no difference whether the plaintiffs have, by their conduct, become estopped from setting up that the goods are domestic, or whether they are unable to maintain their suit because they paid as they did to an agent, who disposed of the moneys in the regular course of business before any notice not to do so had been given him. In the *De Lima* case (p. 179) the court says: "It is true that to prevent the seizure of the sugars the plaintiffs did enter them as imported merchandise, but any admission derived from that fact is explained by their protest against the exaction of duties upon them as such. They waived nothing by taking this course."

In the entire discussion of *Elliott* v. *Swartwout* (10 Pet., 137–154), to be found in the *De Lima* case on pages 177–180, the Supreme Court seems to assume that the objection, protest, and notice in the *Elliott* v. *Swartwout* case are necessary conditions precedent to a common-law recovery, and the conclusion appears to be inevitable that without such action no recovery could have been had in either case. I am quite familiar with the reasoning of the court in the *Fassett* case (142 U. S., 486), and also with the manner in which that reasoning was treated in the *De Lima* case.

In the case of *Flint Eddy and American Trading Co.* v. *Bidwell* (123 Fed. Rep., 200) the Circuit Court held that an action for the recovery of duties can not be maintained where the duties have been paid without

objection or protest, and affirmed the decision in the case of *Dewell et al.* v. *Mix, supra.*

V.

Error of Court of Claims.

The Court of Claims, in its opinion in this case overruling the demurrer filed by the United States, disposes of this whole question in four brief paragraphs. (R. 14—II.)

In the case of *Warner, Barnes & Co.* v. *United States* (197 U. S., 419; 202 U. S., 484), referred to in the opinion of the Court of Claims, the failure of the claimants to enter protest against the payment of the duties was not presented to the Court of Claims at the hearing of the case nor considered by the court in its opinion; nor was there anything in the record transmitted by the Court of Claims to this court to indicate whether protest had or had not been made.

At the first hearing of the *Warner-Barnes* case in this court the failure of the claimants to enter protest upon the payment of the duties was not referred to in the argument of the case nor mentioned in the opinion of the court.

Upon the rehearing of the case by this court argument was strictly limited to the question of ratification. While the failure of the appellants to protest was referred to by the Attorney-General in his argument upon the rehearing, an examination of the language used by him (p. 495) shows beyond question that the absence of protest was referred to in his dis-

cussion of the opinion in the case of *De Lima* v. *Bidwell* only as bearing upon the question of ratification.

It will not do to say that because the question of voluntary payment might have been considered by the court in the *Warner-Barnes* case it will be deemed to have been considered and that the Government is thereby estopped from raising that question in this case. If appellees were entitled in this case to invoke the doctrine of *res adjudicata*, that rule would be true. If the doctrine of *res adjudicata* could be invoked, the appellees would be entitled under that doctrine to a ruling by this court that all questions that might have been considered in the former case shall be deemed to have been considered, and therefore barred from consideration in the present case. But, unfortunately for appellees, the doctrine of *res adjudicata* can not be invoked in this case. The two fundamental elements underlying *res adjudicata*, which would warrant the application of that doctrine to this case, are absent, namely, the same parties and the same cause of action. Here we have entirely different parties and an entirely different cause of action from those in the *Warner-Barnes* case.

The appellees can not invoke the doctrine of *stare decisis* upon rules that apply to the doctrine of *res adjudicata*. In other words, the court will not consider the opinions in the *Warner-Barnes* case as decisive of the question of voluntary payment raised in this case, simply upon the ground that voluntary payment might have been presented and considered

by the court in the *Warner-Barnes* case. The doctrine of *stare decisis* is the doctrine of precedents. The matter must have been presented in the former case and fully disposed of in the opinion. In other words, the court will not consider as a precedent something that *might* have been presented and considered in the previous case.

The Court of Claims, in its reference to the case of *Swift Co.* v. *United States* (111 U. S., 22), clearly indicates that it did not thoroughly comprehend the exact points decided by this court.

The case of *Swift Co.* has no application whatever to the question of protest involved in the case at bar. In that case there was an express contract. The company, which was engaged in the manufacture of matches, furnished its own dies for the stamps used by it and was entitled to a commission of ten per cent on the price of the stamps. The Treasury Department would not pay the commission in anything but stamps, which the company accepted for a long period, and which were worth to it only ninety cents to the dollar. There was no mistake of law and there was no mistake of fact in this case in the payment of the commission in stamps.

It was in consequence of an arbitrary ruling of the Internal Revenue Bureau that *Swift Co.* was paid less than it was entitled to receive. The case was decided upon the ground that the Commissioner had deliberately adopted an unalterable course of dealing which he had made known

to those interested, and it was well known that business could be transacted in no other way. The court said: "A rule of that character, deliberately adopted and made known and continuously acted upon, dispenses with the necessity of proving in each instance of conformity that the compliance was coerced," and this, the court held, upon the authority of the case of *United States* v. *Lee* (106 U. S., 196), dispensed with the necessity for protest.

This court, in the case of *Swift Co.*, upon the authority of *Ogden* v. *Maxwell* (3 Blatchf., 319), said that "It was held that illegal fees exacted by a collector, though sanctioned by a long-continued usage and practice in the office, under a mistaken construction of the statute, even when paid without protest, might be recovered back, on the ground that the payment was compulsory and not voluntary."

This language was used by the court in a general discussion of voluntary and involuntary payments, and was not material to the grounds upon which the case was decided.

The case of *Ogden* v. *Maxwell* does not involve the same principle as the case at bar, nor was it held, as stated in the opinion of this court in the case of *Swift Co.*, that protest was not necessary. In that case the collector of customs was entitled to charge a fee of twenty cents for every permit to land goods, and these fees were paid for the use of the collector. The collector, instead of issuing a permit to each passenger to land his personal baggage and tools of trade, issued one permit for the whole vessel,

but demanded and received the pay of one permit for every five passengers. What the court did hold was that, as it was not required by statute, no *written protest* was necessary, which raises the inevitable inference that a verbal protest was necessary.

In the *Swift Co.* case, in addition to the fact that there was an express contract, there was also a running account of practically continuous transactions between the Government and the company, and the commissions for the printing of the stamps were paid by the Government to the company. It would be just as reasonable to hold that in a running account between a merchant and a customer, where an account had been rendered by the merchant allowing certain credits, which were, in fact, incorrect, a protest by the customer, where he had paid the bill, was necessary in order to entitle him to recover what was due him on the account stated.

In the case at bar each collection was a separate and distinct transaction, and after its completion the account was closed, and the vessel, after discharging its cargo, sailed away to some other port, from which it might return with another cargo, or it might discharge its cargo at some other port, or it might return with an entirely different class of goods.

The Court of Claims also acquired an erroneous conception of the relation which the case of *The United States* v. *Edmonston* (181 U. S., 500) bears to the *Swift Co.* case.

The *Edmonston* case, while it reaffirms the *Swift Co.* case, also explains more in detail why a protest was

not necessary upon each payment for the stamps. It does not, however, by any means create the impression that protest, even in this class of cases, is not necessary, but only that protest having once been made it is not necessary to repeat the protest at every successive transaction.

This court in the case of *The United States* v. *New York and Cuba Mail S. S. Co.* (200 U. S., 488), clearly drew the distinction between the purchase of internal-revenue stamps in the case of *Swift Co.*, where there was a succession of purchases that amounted to an almost continuous transaction, and those cases where each payment formed a distinct and separate transaction. At page 494 the court said:

> There is no such imminence in the duress charged by defendant in error. It purchased the stamps of a dealer at various times. No information was given to the collector of internal revenue of the particular purpose nor claim that the law was unconstitutional. There was no claim of the collector of the port from whom the clearances were asked that defendant in error was acting under the restraint of the law and yielding only to enable his ships to depart to their destinations. All determining conditions, therefore, are the same as in the *Chesebrough case.*

VI.

Appellees Have no Equities.

It may therefore be stated as a well-settled rule of law, independent of any statutory provisions, that

there can be no recovery of illegal duties unless paid under compulsion and with protest at the time of payment.

However, aside from the well-settled rule of law in this class of cases, there existed another strong and equitable reason for the requirement of protest—the very order under which the duties in the case at bar were collected was finally prepared in response to representations of the importers themselves, who should, in fairness, have given some notice of an objection to a tariff which, in part at least, was the result of their own counsel.

All the duties collected in the ports of the Philippines during the time covered by the transactions in question, were used to support the government there for the protection of life and property. Had the United States at any time withdrawn from the Philippines, a condition of anarchy would have prevailed, and there would have been little or no protection to these and similar claimants in conducting their affairs. In fact, their business would have been sacrificed. From an equitable standpoint, the claimants in this class of cases do not occupy an enviable position. After having joined in the preparation of a schedule of tariff duties to be imposed and collected for the support and maintenance of a local government which would afford protection to their business interests, and after having acquiesced in the collection of the duties voluntarily, they are here, unsupported by any rule or principle of equity known to the law.

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THE COLLECTION OF THE DUTIES IN QUESTION WAS VALIDATED BY THE ACT OF JUNE 30, 1906 (34 STATS., 636).

I.

Establishment of Territorial Government in the Philippines.

The sequence of events in the Philippine Islands, from the destruction of the Spanish fleet by Admiral Dewey up to the first enactment by Congress of legislation for the government of the islands, shows that from the very moment of their acquisition by the United States, a territorial government was established in those islands, more complete and comprehensive in its scope than was ever established, in the first instance, in any territory previously acquired by the United States, except where Congress created the territory by an organic act. The government was so perfect in all of its details that the military régime shaded off, almost imperceptibly, into a civil form of government, which in its entirety was adopted by Congress.

It is important to consider the conditions that confronted the President upon the cession of the Philippine Islands to the United States on April 11, 1899. Congress was not in session. The President was compelled to at once assume control over a semibarbarous, heterogeneous people, scattered over a large number of different islands, who had very little conception of civilized government; a people speaking different languages; at war with each other and in insurrection against the United States. The authority

of the President to establish government and maintain peace and order in the islands was an authority, as Mr. Justice Brown said in the *De Lima-Bidwell case*, "not necessarily arising from the Territorial clauses of the Constitution, but from the necessities of the case and from the inability of the States to act upon the subject." The learned justice was there discussing the clause of the Constitution which vests in Congress the power to make rules and regulations for the government of the Territories.

We think it will be accepted as a correct interpretation of the law, that the power vested in Congress by the Constitution for the control of newly acquired territory, rests in the Executive, acting through the military arm of the Government, upon the failure of Congress to exercise such power. It was impossible for the President to establish a local government in the Philippine Islands under the conditions then existing. It was likewise impossible for the same reason to establish an internal-revenue system by which taxes could be imposed upon the property of the inhabitants and revenue raised for the support of the government. Some other plan had to be adopted; some other remedy had to be devised, and the most feasible plan was to establish, under military government, a revenue system such as the President did establish. The Customs Tariff and Regulations constituted the agency through which the revenues were raised for the support of a Territorial government in the Philippine Islands. The military government thus established

was continued by the President until after the issuance of his letter of April 7, 1900, when he outlined a plan for the establishment of a civil form of government in the islands. Congress seems to have accepted and concurred in the action of the President in thus governing the islands.

No legislation was enacted by Congress relative to the government of the Philippines Islands until the act of March 2, 1901, known as the "Spooner amendment," which vested all military, civil, and judicial powers necessary to govern the islands in such person or persons as the President might designate, to be exercised in such manner as the President might direct. The authority of Congress to delegate this power to the President has been sustained by this court in the *Dorr case*. (195 no. 138) The Spooner amendment not only continued in force the government already established by the President, but vested in him almost unlimited authority to establish any kind of government that he might deem proper for the islands.

The Spooner amendment was followed by the act of Congress of March 8, 1902, which ratified and confirmed the tariff act of the Philippine Commission of the 17th of September, 1901, which imposed duties upon articles imported into the Philippine Archipelago from the United States, as well as from foreign countries.

This was followed by the act of July 1, 1902, in the first section of which Congress approved, ratified, and confirmed the acts of the President and the Philippine Commission as established under the President's

instructions of April 7, 1900, and the Executive order of June 21, 1901. Section 2 of the act approved, ratified, and confirmed the acts of the President in promulgating the order of July 12, 1898, known as the "Tariff Rules and Regulations," and the collection of duties thereunder.

In the case of *Warner, Barnes and Company* v. *The United States* (197 U. S., 419, and 202 U. S., 484) it was held by this court that the second section of the act of July 1, 1902, did not ratify the collection of duties on goods imported into the Philippine Islands from the United States between the date of the ratification of the treaty and the act of Congress of March 8, 1902. It will be observed, however, that every step taken by the President, every act performed by both military officers and civil authorities under his direction, with the exception of the collection of the duties above referred to, had been approved, ratified, and confirmed by Congress, and had therefore become a part of the established territorial form of government of the Philippine Islands. In other words, with the act of July 1, 1902, nothing was left undone by Congress to legalize the entire system of government theretofore established, except the ratification of the collection of duties on goods imported into the Philippines from the United States during the period between the ratification of the treaty and the act of March 8, 1902. That Congress considered it had ratified the collection of these duties by the act of July 1, 1902, is apparent from the fact that almost immediately following the second decision of this

court in the *Warner-Barnes case* the act of June 30, 1906, was passed, which is as follows:

> That the tariff duties, both import and export, imposed by the authorities of the United States or of the provisional military government thereof in the Philippine Islands prior to March eighth, nineteen hundred and two, at all ports and places in said islands upon all goods, wares, and merchandise imported into said islands from the United States or from foreign countries, or exported from said islands, are hereby legalized and ratified, and the collection of all such duties prior to March eighth, nineteen hundred and two, is hereby legalized and ratified and confirmed as fully to all intents and purposes as if the same had by prior act of Congress been specifically authorized and directed.

It is with the constitutionality of this act, legalizing the collection of all tariff duties paid on goods shipped into or from Philippine ports prior to March 8, 1902, that we are now concerned.

II.

Territories Under Exclusive Control of Congress.

The Territories are governed by Congress almost entirely independent of any limitations contained in the Constitution. Congress has power either to govern Territories directly, or to establish such government therein as it deems proper, or to delegate its power to establish such government.

That Congress had power to delegate to the President authority to make all rules and regulations

necessary for the establishment of a civil government in the Philippine Islands, was held by this court in the *Dorr case*. There is no limitation as to the kind of government it may establish in the Territories. In other words, it may establish one kind of government in the Philippines, another in Porto Rico, and still another in Arizona. The government of the Northwest Territory was delegated by Congress to a governor and three judges, with authority to pass needful laws (1 Stat. L., 51). A similar provision was made for the government of the Territory of Louisiana (2 Stat. L., 283). In these Territories the acts of the governor and three judges were afterwards ratified and confirmed by Congress. A similar course has been pursued in organizing governments in other Territories of the United States. In the case of *American Insurance Company* v. *Canter* (1 Pet., 511) a judgment, passing title to 156 bales of cotton, rendered by a court in the Territory of Florida, consisting of a notary public and five jurors, was held valid by this Court. In the case of the *National Bank* v. *The County of Yankton* (101 U. S., 129) it was held that Congress

> has full and complete legislative authority over the people of the Territories and all the departments of the Territorial governments. It may do for the Territories what the people under the Constituion of the United States may do for the States.

III.

The Act does not Interfere with Vested Rights.

Claimants in the court below attached great importance to the fact that this suit had been instituted prior to the passage of the act of June 30, 1906. It was contended that inasmuch as a suit was pending at the time of the passage of this act, there existed such a vested right in the appellants as could not be divested by an act of Congress.

The mere bringing of a suit does not create a vested right. It is only the assertion of a right. The right, if any exists in this case, accrued when the duties were collected, and that is the only right the claimants can now assert. Their rights have not been increased or diminished by the institution of this suit. The Court of Claims, in its opinion, has fallen into the error of holding that an implied promise to return an illegal tax bestows upon the taxpayer a vested interest in its return. The mistake the Court of Claims made was in assuming that Congress has no power to divest a vested right. It is unnecessary for us to go to that extent in this case, for the reason that no rights have here vested. However, the authorities that we shall cite, both State and Federal, are unanimous in holding that the legislative branch of the Government may divest vested rights after the institution of suit as completely as before.

It is contended that this court in the case of *De Lima* v. *Bidwell* held that where suit had been instituted to recover an illegal tax such a right had

vested as could not be taken away by an act of Congress. We do not think that the opinion in the *De Lima case* will admit of such construction. This court in the second *Warner-Barnes decision*, at page 498, said:

> The statute does not ratify all actions or all collections of taxes, as it easily might have done, but only actions in accordance with the order.

After using this clear and unmistakable language, the court said that since Congress had passed the act of July 1, 1902, after the decision of the *De Lima case*, that in view of the "grave doubt at least" cast upon the power "to ratify taxes under circumstances like the present," if Congress had intended to encounter the limitations of that case, it would have done so in unambiguous language from which there could be no escape. The language used in the *De Lima case*, which is referred to as casting grave doubt upon the power of Congress to ratify a tax under the circumstances (pp. 199 and 200), is not applicable to the questions involved in the case at bar. The statute there in question was merely an appropriation act, the retroactive effect of which was extremely doubtful, and the payment of the duties had been duly protested. *In the case at bar there was no protest whatever.* In fact, this court used language in the same opinion which clearly indicates that it has no application to the case at bar, when it said:

> Perhaps we may go further and say, that so far as these duties were paid voluntarily

> and without protest, the legality of payment was intended to be recognized; but it clearly can not have any retroactive effect as to moneys theretofore paid under protest in which action to recover back had already been brought.

The meaning intended to be conveyed in the *Warner, Barnes case* was that Congress, as a body unlearned in the refinements of the law, might very naturally, in view of the language used in the case of *De Lima* v. *Bidwell* and its apparent purpose, have hesitated to pass an act depriving the plaintiffs, who had already brought suits, of the right to continue those suits to judgment, and that if any other construction could be placed upon the act it was the duty of the court to do so. The language used in the *Warner, Barnes case*, however, distinctly removed the *grave doubt* which this court thought might have caused Congress to hesitate in meeting the limitations of the *De Lima case.*

It was contended by counsel for appellees in the court below that the act of June 30, 1906, was passed for the purpose of ratifying the collection of duties in the Philippines after April 11, 1899, *for which suits had not already been instituted.* The language of the statute will bear no such interpretation. It was passed as an act supplementary to and interpretative of the act of July 1, 1902, and this is shown beyond a reasonable doubt by the proceedings in Congress immediately before the passage of the act in question.

On June 28, 1906, there was a debate in Congress upon the bill, which appears on page 9769 of

the Congressional Record (59th Cong., 1st sess., vol. 40) in the identical language in which it was enacted. To this bill an amendment was offered by Senator Morgan, prepared by the attorneys representing the different claimants, which is as follows:

> *Provided*, That this act shall not apply to suits pending in the Court of Claims on the 28th day of May, 1906, for the recovery of duties paid in the Philippines on imports from and exports to the United States, and imports from Spain from and including April 11, 1899, to November 15, 1901. (Id., 9770.)

This amendment, it is needless to say, never became a law.

There was also spread upon the Congressional Record a brief by the attorneys for the claimants, setting forth, among other things, the language relied upon in the case of *De Lima* v. *Bidwell*, and the opinions of the Supreme Court in the case of *Warner, Barnes & Co.*, both upon the original hearing and the reargument of the case. (Id., 9770–9774.) It is therefore clear that Congress, in passing the act of June 30,1906, intended to meet squarely the limitations of the case of *De Lima* v. *Bidwell*, and intended, beyond a doubt, to ratify all collections of duties in the Philippines after April 11, 1899, whether suits had been instituted for their recovery or not.

IV.

The Act is not in Conflict with the Revenue Clauses of the Constitution.

The act of Congress under consideration is not affected by the revenue clauses of the Constitution. In the case of *Downes* v. *Bidwell* (182 U. S., 244) this court, in passing upon the constitutionality of the Foraker Act (31 Stats. L., 77), held that customs duties collected at the port of New York on goods imported from Porto Rico were legally collected. The court in referring to sections 8 and 9, article 1, of the Constitution, as applying to imports from territories of the United States, said:

> We are therefore of the opinion that the island of Porto Rico is a territory appertaining and belonging to the United States, but not a part of the United States, within the revenue clauses of the Constitution; that the Foraker Act is constitutional, so far as it imposes duties upon imports from such island, and that the plaintiff can not recover back the duties exacted in this case.

In the second *Dooley case* (183 U. S., 151), construing the same act, the court held that article 1, section 9, of the Constitution applied only to articles exported from the States of the Union to foreign countries, and not to articles exported from a State to a Territory of the United States. It was there held that articles shipped from New York to Porto Rico are, in view of the fact that the duties were to

be applied to the maintenance of the government of Porto Rico by the act, collections upon imports and not upon exports.

V.

The Obligation of Contracts not Impaired.

The right to recover an illegal tax is not strictly a right depending upon contract. At least, not such a contract as would come properly within section 10, article 1, of the Constitution, which declares that no State shall make any law impairing the obligation of contracts. It will be observed that this is a limitation upon the States and not a limitation upon any general power of Congress. It is unnecessary, however, to enter into any discussion as to the power of Congress to pass a law impairing the obligation of contracts. The implied promise to refund an illegal tax (if a promise can be implied) is not such a contract as comes within the limitations of the Constitution. The contracts protected by the Constitution are such as have been deliberately entered into by the parties and "assent to be bound is of the very essence of the obligation protected by the Constitution," and has no application to "obligations imposed by the law without the assent of the party bound." (Amer. & Eng. Encyc. of Law, vol. 15, 2d ed., 1032, and cases cited.) Nor is Congress necessarily limited by this clause in its enactment of legislation, because the practical effect may be to incidentally impair or annul contracts. (Ib., p. 1045.)

VI.

Power of Congress to Ratify.

This is not an attempt to lay a tax which Congress now thinks ought to have been imposed six or seven years ago, but to ratify and legalize a tax collected then upon authority which all parties interested, taxpayer and tax collector alike, thought at that time to be legal. Our contention, briefly stated, is that if Congress, on April 11, 1899, could legally have imposed the duties in question in this case, it can now ratify and legalize the collection of those duties.

In the second opinion in the *Warner-Barnes case* this court said that "undoubtedly the order of July 12, 1898, contemplated vessels from America as well as others," and, while considering it unnecessary to construe the order, said:

> The ratification may be assumed to apply to the order as actually made and not to have been limited to such an order or so much of this order as the President had a right to make. But it does not construe the order, and as it confines the ratification to actions in accordance with the order and amendments, the question, What actions were in accordance with them is for us. The statute does not ratify all actions or all collections of taxes, as it easily might have done, but only actions in accordance with the order.

Further on the court, in its opinion, stated that the President had authority, after the final ratification of the treaty of peace with Spain, to collect customs

duties on imports from foreign countries into the Philippine Islands under existing laws, and that because the act of July 1, 1902, was not necessary to ratify collections prior to April 11, 1899, it was not for that reason without meaning, as it set at rest any question concerning the validity of the collection of duties on foreign imports into the Philippine Islands under the order of July 12, 1898. In other words, it ratified the authority of the President to collect duties for a less amount than was provided for by existing laws, if any ratification should be necessary.

Mr. Justice White, in his dissenting opinion in the *Warner-Barnes case* (concurred in by Mr. Justice McKenna), not only held that Congress *had the power* to ratify the collection of duties under the order of July 12, 1898, after the conclusion of peace, but that Congress actually *had so ratified them*. This opinion, considered in connection with the language used by the majority of the court, leads to the irresistible conclusion that this court was agreed upon the power of Congress to ratify.

VII.

Authorities in Support of the Above Propositions.

It has been generally held in the States that retroactive laws may be enacted where they are not *ex post facto* and do not interfere with vested rights to the extent of impairing the obligation of contracts.

In the case of *Grim* v. *Weissenberg School District* (57 Pa. St., 433) the power of the legislature to subsequently ratify a tax, levied without authority of

law, for raising a bounty for volunteers during the civil war was in question. Judge Sharswood, delivering the opinion of the court, said:

> The argument for the unconstitutionality of this act is placed on this ground: That at the time of its passage the claimant had a vested right to recover back from the township the money which he had been compelled to pay without authority of law; and this vested right the legislature could not divest. If an act of assembly be within the legitimate scope of legislative power, it is not a valid objection that it divests vested rights. There is no clause, either in the Constitution of the United States or of this Commonwealth, which prohibits retrospective laws. * * *
>
> The power of taxation is a necessary and indispensable incident of government. It also has limits, but they are broadly marked and well defined, e. g., an act of the legislature authorizing contributions to be levied for a mere private purpose, etc. Within this limit the power of the legislature to impose taxes or to authorize their imposition by subordinate municipal authorities is of necessity discretionary. To permit its wisdom, policy, or even the equality to be questioned judicially would be to stop the wheels of government. * * *
>
> The taxation impeached in the case before us was clearly within the limit thus prescribed. It was for a public purpose and to subserve an end eminently advantageous to the community upon which it was levied. It has not been pretended, and could not be, that the

> legislature had not the power antecedent to authorize it. If so, they could cure any irregularity or want of authority in levying it by a retroactive law, even though thereby a right of action which had been vested in an individual should be divested. It is within the principles of all the decisions of admitted authority. If the legislature can cure an irregularity in a judgment or other legal proceedings * * * by retroactive laws, thereby destroying legal claims or defenses, or practically transferring legal vested titles, *a fortiori* may they make valid the acts of public officers in the *bona fide* performance of public duties, such as that of levying and collecting taxes imposed for an admitted public good and whose justice and equality are not impugned. The familiar maxim applies in such a case: *Omnis ratihabitio retrotrahitur et mandato priori equiparatur.* Nor is there any greater force in the argument which has been strongly urged upon us that the plaintiff, having commenced this action before the passage of the confirming act, had thereby acquired a right to his costs of suit, of which he can not now be deprived. There is no vested right to costs in any case of which a party can not be divested by the legislature.

The same principle of law is stated briefly and clearly in "Cooley on Taxation" (vol. 2, p. 1493):

> A property owner who has paid an illegal assessment has, in his action to recover back payment, no vested right which legislation

> can not take away, nor is there any implied agreement to return the assessment if wrongfully collected which would invalidate such legislation as imparing the obligation of the contract.

In Iowa it is held that where a tax had been levied without authority of law and a subsequent act of the legislature legalizing the levy and collection of the tax was enacted, such act was constitutional. (*Iowa R. R. and Land Co.* v. *Soper*, 39 Iowa, 112; *Boardman* v. *Beckwith*, 18 Iowa, 292.)

In a suit for the recovery of taxes paid in Oregon under an invalid assessment for street improvements, it was held that a subsequent act legalizing the levy and collection of the taxes was constitutional. (*Nottage* v. *City of Portland*, 35 Oregon, 539.)

In the case of *Hardeman* v. *Downer* (39 Ga., 425), where a homestead act exempting certain property from execution affected the lien of a judgment creditor, the court said (p. 436):

> It is contended, however, in this case, that the rights of these parties are fixed by the judgment and that the homestead law divests a vested right, and is therefore void. It is well settled that it is no violation of the Constitution of the United States for a State to pass a law divesting a vested right, provided that right is not vested by the contract of the parties. (*Satterlee* v. *Mathewson*, 2 Peters, 380; *Watson* v. *Mercer*, 8 Peters, 88; *Charles River Bridge* v. *Warren Bridge*, 11 Peters, 420; *Baltimore & Susquehanna R. R. Co.* v. *Nesbit*,

10 How., 395; *Carpenter* v. *Pennsylvania*, 17 How., 456.)

In Maryland a statute declared void all bonds, contracts, and assurances whatsoever, upon which a usurious rate of interest was charged. A subsequent act provided that in cases of usurious contracts, only the excess over the legal rate of interest should be forfeited. It was held that this exercise of the legislative power relating to preexisting usurious contracts was constitutional. (*Wilson* v. *Hardesty*, 1 Md. Ch. Dec., 656.)

In Ohio an act of the legislature taxing a bank which at the time of its organization was exempted from taxation by law, was held constitutional. (*Sandusky City Bank* v. *Wilbor*, 7 Ohio, 481.) The opinion in this case cites the case of *Charles River Bridge* v. *Warren Bridge*, 11 Peters, 539, where Chief Justice Taney said:

> It is well settled by the decisions of this court that a State law may be retrospective in its character, and may divest vested rights, and yet not violate the Constitution of the United States, unless it also impairs the validity of a contract.

The court also cites with approval the case of *Satterlee* v. *Mathewson* (3 Peters, 413) and *Watson et al.* v. *Mercer* (8 Peters, 110).

In New York, where a mortgagor under a subsequent statute was deprived of his right of redemption, the court held "that the power of the legisla-

ture to interfere with vested rights is unlimited, save by the restrictions contained in the Federal and State constitutions." (*Butler* v. *Palmer*, 1 Hills. N. Y., 324.)

Wait, in his work on "Actions and Defenses" (vol. 4, p. 506), upon the authority of *Hyde* v. *City of New Orleans* (11 La. Ann., 191), summarizes the law giving authority to legalize taxes where suit has been brought:

> Although the tax was illegal when paid, yet if before a final judgment in an action to recover it back the tax is legalized a recovery can not be had.

It has been held by this court in a number of cases that acts of a State legislature or Congress which affect procedure in courts where actions are in process of litigation, or even after judgment, are constitutional.

In the case of *Calder* v. *Bull* (3 Dall., 386), where a probate court in Connecticut by decree refused to record a will, thereby vesting the property of the decedent in certain heirs, the legislature enacted a law setting aside the decree and granting a new trial with the right of appeal. In the new trial the will was recorded. This court in passing upon the validity of the statute said:

> The effect of the resolution or law of Connecticut above stated is to revise a decision of one of its inferior courts, called the court of probate for Hartford, and to direct a new hearing in the case by the same court of pro-

> bate that passed the decree against the will of Norman Morrison. By the existing law of Connecticut, a right to recover certain property had vested in Calder and wife (the appellants) in consequence of a decision of a court of justice, but in virtue of a subsequent resolution or law and the new hearing thereof and the decision in consequence, the right to recover certain property was divested and the right to the property declared to be in Bull and wife, the appellees. The sole inquiry is whether this resolution or law of Connecticut, having such operation, is an *ex post facto* law within the prohibition of the Federal Constitution.

This court held that the law did not fall within the technical definition of an *ex post facto* law and did not impair the obligation of a contract, and by unanimous decision sustained the judgment of the Supreme Court of Errors of Connecticut.

In the case of the *Baltimore and Susquehanna R. R. Co.* v. *Nesbit et al.* (10 How., 395–401), the court said:

> If it were necessary to sustain by precedent the authority or practice of the State legislature in awarding a new trial, or in ordering a proceeding in the nature of an appeal, after litigation actually commenced, or even after judgment, and as to which provision for new trial or appeal had not been previously made, a very striking example from this court might be adduced in the case of *Calder and Wife* v. *Bull and Wife*, decided as long since as 1798, and reported in the 3d of Dallas, page 386.

The case of *Satterlee* v. *Matthewson* (2 Peters, 378) strongly supports the position taken by the appellants in this case, that legislatures may pass retroactive acts divesting vested rights, and goes further even than the case of *Calder* v. *Bull*, in that it absolutely and unequivocally deprived one of the parties to a suit of his right of action. In that case Satterlee and Matthewson held lands in the State of Pennsylvania as tenants in common under a Connecticut title. The lands were afterwards divided between them, and Satterlee became the tenant of Matthewson under a lease to be terminated on a year's notice. Satterlee afterwards secured a Pennsylvania title to the land leased from Matthewson, and upon trial in a suit for ejectment, brought by Matthewson, the court of common pleas of Bradford County, Pa., held that Satterlee, having held the land as tenant of Matthewson, could not set up a title against his landlord.

The case was taken to the Supreme Court of Pennsylvania upon a writ of error in 1825, and it was held that "The relation between landlord and tenant could not exist between persons holding under a Connecticut title." On April 8, 1826, the legislature of Pennsylvania enacted a statute declaring that "The relation of landlord and tenant should exist and be held as fully and effectually between Connecticut settlers and Pennsylvania claimants as between citizens of the Commonwealth." The case came up for hearing a second

time before the Supreme Court of Pennsylvania, which held that the act of assembly of April 8, 1826, was constitutional and affirmed the judgment of the court of common pleas of Bradford County in favor of Matthewson. Satterlee then brought the case on writ of error to the Supreme Court of the United States, claiming that the act of April 8, 1826, was unconstitutional. This court held that—

> There is nothing in the Constitution of the United States which forbids the legislature of a State to exercise judicial functions.
>
> There is no part of the Constitution of the United States which applies to a State law which divested rights vested by law in an individual, provided its effect be not to impair the obligation of a contract,

and the court in its opinion said:

> The objection, however, which was most pressed upon the court and relied upon by the counsel for the plaintiff in error was that the effect of this act was to divest rights which were vested by law in Satterlee. There is certainly no part of the Constitution of the United States which applies to a State law of this description; nor are we aware of any decision of this or of any Circuit Court which has condemned such a law upon this ground, provided its effect be not to impair the obligation of a contract; and it has been shown that the act in question has no such effect upon either of the contracts which have been before mentioned.

Another case in point, that of *Watson* v. *Mercer* (8 Peters, 88), arose out of the following state of facts: Mercer and his wife executed a deed conveying certain land belonging to the wife to a third party, who reconveyed the same to the husband. The acknowledgment of the deed from Mercer and wife to the third party was defective under the laws of Pennsylvania. After the death of the wife, her heirs recovered the land in a suit of ejectment from Mercer. Subsequently an act was passed by the legislature of Pennsylvania curing defective acknowledgments, and under said act the heirs of the husband recovered the land in a suit of ejectment from the heirs of the wife. The question of the validity of the act was decided in favor of its constitutionality by the Supreme Court of Pennsylvania. The case came to this court upon a writ of error.

Mr. Justice Story, delivering the opinion of the court, said:

> As to the first point, it is clear that this court has no right to pronounce an act of the State legislature void, as contrary to the Constitution of the United States, from the mere fact that it divests antecedent vested rights of property. The Constitution of the United States does not prohibit the State from passing retrospective law, generally; but only *ex post facto* laws. Now, it has been solemnly settled by this court, that the phrase *ex post facto* laws is not applicable to civil laws, but

> to penal and criminal laws, which punish a party for acts antecedently done, which were not punishable at all, or not punishable to the extent or in the manner prescribed. In short, *ex post facto* laws relate to penal and criminal proceedings, which affect private rights retrospectively. The cases of *Calder* v. *Bull* (3 Dall., 386), *Fletcher* v. *Peck* (5 Cranch, 138), *Ogden* v. *Saunders* (12 Wheat., 266), and *Satterlee* v. *Matthewson* (2 Pet., 380) fully recognize this doctrine.

In the case of *Hamilton* v. *Dillin* (supra) the President, without express authority from Congress, imposed a fee of four cents a pound on cotton imported from disloyal into loyal States during the civil war. What was known as the nonintercourse act of July 13, 1861 (12 Stat., 257), contained a provision that the President might, in his discretion, license and permit intercourse between the citizens of loyal States and the inhabitants of insurrectionary States, the intercourse "to be conducted and carried on only in pursuance of rules and regulations prescribed by the Secretary of the Treasury."

In pursuance of this provision the President issued an Executive order licensing and permitting such intercourse "to be conducted and carried on only in pursuance of rules and regulations prescribed by the Secretary of the Treasury," and accompanying this order were certain rules and regulations of the Secretary of the Treasury, approved by the President, one of which provided that "for each permit to purchase cotton in any insurrectionary district and to trans-

port the same to a loyal State, per pound * * * four cents."

The appellant brought suit on assumpsit in the court below against Dillin, the surveyor of the port at Nashville, Tenn., to recover fees paid by him from August, 1863, to July, 1864. Congress afterwards passed a ratifying act, July 2, 1864 (13 Stat., 375), in which it legalized

> fees collected under the rules and regulations made by the Secretary of the Treasury and approved by the President, dated, respectively, the 28th of August, 1862, 31st of March, 11th of September, 1863, or under any amendments or modifications thereof which have been or shall be made by the Secretary of the Treasury and approved by the President, for conducting commercial intercourse which has been or shall be licensed and permitted by the President with and in States declared in insurrection.

The court said:

> We are also of opinion that the act of July 2, 1864, recognized and confirmed the regulations in question.

It was upon the authority of the case of *Hamilton* v. *Dillin* that this court intimated, in the case of *Warner, Barnes & Co.* (supra), that Congress could deprive plaintiffs of their vested rights in process of being asserted if the power to do so was in language which could not be construed to have a narrower sense.

In *Comanche County* v. *Lewis* (33 U. S., 198), where bonds were issued by a county in Kansas fraudulently organized, the bonds were declared legal under a subsequent act of the legislature reorganizing the county. The court said:

> The ample power delegated by the constitution to the legislature enabled it not only to organize a county in the manner it saw fit, but also to validate by recognition any organization already existing, no matter how fraudulent the proceedings therefor had been.

The court further said:

> Nor is this ruling peculiar to the jurisdiction of Kansas. It is universally affirmed that when a legislature has full power to create corporations, its acts recognizing as valid a *de facto* corporation, whether private or municipal, operates to cure all defects in steps leading up to the organization and makes a *de jure* out of what before was only a *de facto* corporation. It is true that there must be a *de facto* organization upon which this recognition may act, as was held in *State ex rel. Atty. Gen.* v. *Ford County*, 12 Kansas, 441, 446; and in this case it appears from the findings, as well as from the testimony, that there was such *de facto* organization. There being this *de facto* organization, there was ample recognition by the legislature.

In the case of *Street* v. *United States* (133 U. S., 299), in which ratification was unnecessary, the court went out of its way to affirm in clear and forci-

ble language the decision in the case of *Comanche County* v. *Lewis:*

> But we are not limited to this. Full power of legislation in the matter of increase and reduction of the Army is with Congress. It prescribed in this act the proceedings by which that reduction was to be accomplished. In pursuance of that act certain proceedings were had. The power which can direct what proceedings shall be had can approve and make valid any proceedings which are actually taken. The power which can give authority to act can ratify any act that is taken, and generally legislative recognition of an act or a corporation validates the act or the corporation, although neither one nor the other may have had full prior legal authority. (*Comanche County* v. *Lewis, ante*, 198.)

In *Mattingly* v. *The District of Columbia* (96 U. S., 687) the power of Congress to legislate retrospectively in relation to matters of taxation in the District of Columbia was upheld. In the opinion the court said:

> There were also acts of the legislative assembly of the District which very forcibly imply a confirmation of the acts and assessments of the board of which the bill complains. If Congress or the legislative assembly had the power to commit to the board the duty of making the improvements and to prescribe that the assessments should be made in the manner in which they were made, it had power to ratify the acts which it might have authorized. And the ratification, if made, was equivalent to an original authority,

according to the maxim, *Omnis ratihabitio retro trahitur et mandato priori æquiparatur.* Under the Constitution, Congress had power to exercise exclusive legislation in all cases whatsoever over the District, and this includes the power of taxation. (*Cohen* v. *Virginia*, 6 Wheat., 264.) Congress may legislate within the District, respecting the people and property therein, as may the legislature of any State over any of its subordinate municipalities. It may therefore cure irregularities and confirm proceedings which without the confirmation would be void, because unauthorized, provided such confirmation does not interfere with intervening rights.

In *National Bank* v. *County of Yankton, supra*, the power of Congress to legislate in relation to the Territories is clearly stated in the opinion of the court as follows:

> In the organic act of Dakota there was not an express reservation of power in Congress to amend the acts of the Territorial legislature, nor was it necessary. Such a power is an incident of sovereignty and continues until granted away. Congress may not only abrogate laws of the Territorial legislatures, but it may itself legislate directly for the local government. It may make a void act of the Territorial legislature valid and a valid act void. In other words, it has full and complete legislative authority over the people of the Territories and all the departments of the Territorial governments. It may do for the Territories what the people, under the Constitution of the United States, may do for the States.

In the case of *Utter* v. *Franklin* (172 U. S., 416) certain bonds issued by Pima County, Ariz., in aid of railroads were declared by this court to be invalid (*Lewis v. Pima County*, 155 U. S., 154). Congress subsequently gave to the legislature of Arizona authority to validate the issue of said bonds, which was done. Thereafter, as doubt still existed in some quarters as to their validity, Congress passed another act ratifying the action of the legislature, and the validity of the last act of Congress was considered in this case. The Court said:

> We think it was within the power of Congress to validate these bonds. Their only defect was that they had been issued in excess of the powers conferred upon the Territorial municipalities by the act of June 8, 1878. There was nothing at that time to have prevented Congress from authorizing such municipalities to issue bonds in aid of railways, and that which Congress could have originally authorized it might subsequently confirm and ratify. This court has repeatedly held that Congress has full legislative power over the Territories, as full as that which a State legislature has over its municipal corporations. (*American Ins. Co.* v. *Canter*, 1 Pet., 511; *National Bank* v. *Yankton County*, 101 U. S., 129.)
>
> Curative statutes of this kind are by no means unknown in Federal legislation. Thus, in *National Bank* v. *Yankton County*, *supra*, this court sustained an act of Congress nullifying a legislative act of the Territory of Dakota authorizing the issue of railway bonds, but validating action theretofore taken by the

county voting subscription to a certain railroad company, holding it to be "equivalent to a direct grant of power by Congress to the county to issue the bonds in dispute." In *Thompson* v. *Perrine*, 103 U. S., 806, we also sustained a similar act of the State of New York ratifying and confirming the action of commissioners in issuing similar bonds. In *Read* v. *Plattsmouth*, 107 U. S., 568, a similar ruling was made with regard to an act of the legislature of Nebraska validating an issue of bonds by the city of Plattsmouth for the purpose of raising money to construct a high school building. See also *New Orleans* v. *Clark*, 95 U. S., 644; *Grenada County* v. *Brogden*, 112 U. S., 261; *Otoe County* v. *Baldwin*, 111 U. S., 1; 1 Dillon, Municipal Corporations, p. 544; Cooley's Const. Lim., 6th ed., 456; *Belles* v. *Brimfield*, 120 U. S., 759; *Anderson* v. *Santa Anna*, 116 U. S., 356; *Dentzel* v. *Woldie*, 30 Cal., 138, 145.

The fact that this court had held the original Pima County bonds invalid does not affect the question. They were invalid because there was no power to issue them. They were made valid by such power being subsequently given, and it makes no possible difference that they had been declared to be void under the power originally given. The judgment in that case was *res adjudicata* only of the issue then presented, of the facts as they then appeared, and of the legislation then existing.

Congress not only had the power in 1906 to ratify and legalize the collection of the duties in question, but it could in 1906 have laid the same duties retrospectively. Suppose, under the proper exigency,

Congress should impose a tax of $1 on all deeds recorded during the past ten years. No one would question the validity of such an act. It would be an excise tax, operating uniformly and equally. Let us assume that the President, doubting his power to lay and collect the duties in question, had inventoried the cargoes of vessels arriving in the Philippines from the United States, announcing that he would ask Congress to impose a retrospective tax, and suppose Congress had done so, it would be the exercise of a power upon the part of Congress which has been upheld by this court.

The act in question does not go to the extent of laying a retrospective tax, but if the court is of opinion that Congress must not only have had authority to impose the tax originally or to have authorized the President to do so, but must also, at the crucial time (June 30, 1906), have had the power to lay the tax retrospectively, then we contend that Congress had full power to act as it did in this case. The exercise of this power by Congress has been upheld in *Stockdale* v. *Insurance Companies*. (20 Wall., 323.) In that case no valid distinction can be drawn, because the court did not there say *impose*, but "*reimpose* the tax retrospectively." The facts of the case made it necessary to use the word "reimpose." In short, the power of Congress to legalize the collection of the duties in question supplies the deficiency in the power of the Executive to lay and collect them, and it merely confuses the issue to say that Congress is attempting to validate an unconsti-

tutional assumption of power on the part of the President. It is not a question of the power of the President to act in the premises, but of the power of Congress to have imposed these duties on April 11, 1899. The constitutionality of the act of the President is immaterial in arriving at the real question of power involved in this case. Congress had the power at all times, and could therefore ratify afterwards.

In the case of the *Florida Central and Pennsylvania Railroad Company* v. *Reynolds* (183 U. S., 471), the legislature of Florida, in 1885, passed an act laying a retrospective tax upon railroads in that State, which had previously been exempt from taxation, commencing March 1, 1879, 1880, and 1881. This court held that the act did not come within that provision of the fourteenth amendment to the Constitution, which declares that property shall not be taken without due process of law, nor within that provision which declares that all persons shall have equal protection of the laws. The court said:

> If the State, as has been seen, has the power in the first instance to classify property for taxation, it has the same right of classification as to property which in past years has escaped taxation.

CONCLUSION.

In conclusion, we would call the attention of the court to the fact that there are no equities in favor of the appellees in this case, and the Government is therefore justified, legally and morally, in employing all proper defenses against the recovery of this money.

The duties were paid into the insular treasury for the support of the Philippine government (R. 24), and were afterwards, it is proper to assume, under the well-recognized laws of trade, recouped from the Filipino people by the importers, who now ask this court to compel the appellants, not to refund money received, but to appropriate money for the payment of something from which they have derived no benefit.

Congress, therefore, having had authority to authorize the collection of these duties in the first instance, has authority now to legalize their collection. Our attention has not been called to a decision of any court or the expression of any text writer where the contrary doctrine has been held to be the law. We submit, therefore, that the validity of the act whereby Congress has sought to ratify and legalize the collection of the duties in question should be sustained.

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Claims should be reversed.

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No. 580.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

THE UNITED STATES, APPELLANTS,

v.

CONRAD HEINSZEN AND GUSTAV BROCKMAN, TRADING AS PARTNERS UNDER THE FIRM NAME OF C. HEINSZEN & CO.

SUMMARY OF THE ATTORNEY-GENERAL'S CLOSING ARGUMENT.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

THE UNITED STATES, APPELLANTS,
v.
CONRAD HEINSZEN AND GUSTAV BROCKMAN, trading as partners under the firm name of C. Heinszen & Co. } No. 580.

SUMMARY OF THE ATTORNEY-GENERAL'S CLOSING ARGUMENT.

In the brief filed on behalf of the appellants it is argued that, whether the ratification of the collection of duties, evidently sought to be ratified by the act of Congress involved in this case, did or did not operate to divest vested rights, such ratification was within the constitutional powers of Congress, and therefore valid. Without in anywise waiving or abandoning the contention thus urged, I propose, during my brief trespass upon the court's attention, to argue that the "right" supposed to be impaired by the legislation in question was not a *vested* right, or even, speaking accurately, a *right* at all.

I venture, in the first place, to point out that, in the present case, there is a special reason for the

application of the well-established principle that this court will not hold an act of the Congress unconstitutional unless the circumstances leave it no other alternative. In the second opinion in the Warner-Barnes case this court indicated what legislative language would indicate unmistakably to its mind the intention of Congress to ratify the collection of the duties in question. Almost immediately after that decision Congress ratified (or attempted to ratify) their collection in precisely the method suggested by this court, thus showing an unmistakable intention on the part of the legislative branch of the Government to take such action. This, however, necessarily involved a deliberate assertion on the part of the Congress that it had the constitutional right to do what it thus clearly and unequivocally attempted to do, so that this court may be confronted by the necessity of declaring a coordinate branch of the Government mistaken as to the limits of its constitutional authority. I submit that this situation justifies and even demands a very careful determination of the question whether any such necessity exists.

What, then, is the "right" claimed to be vested and to be impaired by the ratification? It is not a right to any material and specific property, either real or personal. Title to the money paid by the appellees to the officers who collected these revenues passed (whether rightfully or wrongfully) by delivery; the goods on which the duties were ratified were not lost to the appellees, either wholly

or in part. There is no such situation in this case as existed in the case of the *United States* v. *Lee*, in which the Government sought to deprive individuals of the use and enjoyment of property to which they had a legal title. All that these appellees have ever had which was or could be in anywise affected by the Congressional action claimed to be invalid was a *chose in action;* that is to say, a right to sue the Government for a debt arising from a promise implied in law to repay them money *ex æquo et bono* belonging to them, and therefore by a salutary legal fiction held to have been had and received for their use. Now is such a right to sue the Government a vested right? Is it, properly speaking, a right at all?

It is well settled that, as an attribute of its sovereignty, the Government enjoys an immunity from suit unless by its own permission. This is so clearly true that even when it becomes itself a plaintiff in a civil action the defendant is denied the benefit of the defense of set-off, although this would be open to him in a precisely similar suit brought by a private party. (*State* v. *B. & O. R. R. Co.*, 34 Md., p. 374.) The Congress has indeed permitted claims to be asserted against the Government in the form of suits before special tribunals authorized to hear and determine them under special circumstances and subject to peculiar limitations and regulations, all prescribed by the will of the Congress and subject to change at its pleasure; but these proceed-

ings amount, in last resort, only to an ascertainment for the benefit of the Congress of the fact that, if the Government were a private person, a right of action would exist against it in favor of the claimants. What shall be done as a result of such ascertainment remains entirely within the discretion of the legislative branch of the Government. The Congress may refuse to pay claims thus ascertained, either in whole or in part, and in case of such refusal the claimants possess no means of enforcing their so-called "rights." If the Congress had seen fit to add to the provision ratifying these collections the words "and no moneys heretofore or hereafter appropriated shall be used for their repayment," or words of similar import, the judgment of the Court of Claims would have amounted to the decision of a mere moot question; a right to have such a question decided could hardly be called a "vested right," certainly it would not be a right of property.

I do not feel called upon to discuss the question whether this ratification could be held to deprive the appellee of a right to sue the officers who made the collections individually for money had and received, or on any other ground. It will be time enough to deal with that question when they have asserted such a right. In this proceeding they avoid the effect of the payment by the collecting officers of these funds into the Treasury without notice that the legality of their collection was disputed or their payment by the appellees was in-

voluntary. This question is avoided by suing the Government directly. The suit is founded, not upon a right, but upon a mere privilege or license granted at the pleasure of the National Legislature, and subject at any time, and for any reason satisfactory to the Congress, to be modified, abridged, or taken away altogether. The provision of law whose constitutionality is submitted to the court amounts, at most, to a limitation of this license, an abridgment of this privilege; and, since this court, in dealing with such questions, considers matters of substance and not of mere form, I submit that, in no possible view of the practical effect of this act of the Congress, can it be said to have impaired a vested right or deprived the appellees of anything which can be regarded as property in the light of the constitutional prohibitions.

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